

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Noris J. Stone & Sons, Inc. :
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Corporation :
Franchise Tax under Article 9A of the Tax Law for :
the Fiscal Years Ending 10/31/77-10/31/79. :
_____ :

AFFIDAVIT OF MAILING

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 29th day of February, 1984, he served the within notice of Decision by certified mail upon Noris J. Stone & Sons, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Noris J. Stone & Sons, Inc.
R.R. #2, Box 67
South Salem, NY 10590

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
29th day of February, 1984.

David Parchuck

Anna A. Douglas
Authorized to administer oaths
pursuant to Tax Law section 174

STATE TAX COMMISSION

AFFIDAVIT OF MAILING

Conni P. Kaphan
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

February 29, 1984

Noris J. Stone & Sons, Inc.
R.R. #2, Box 67
South Salem, NY 10590

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Stanley Ferber
Ferber & Trager
370 Lexington Ave.
New York, NY 10017
Taxing Bureau's Representative

STATE TAX COMMISSION

Petitioner, Noris J. Stone & Sons, Inc., R.R. #2, Box 67, South Salem, New York 10590 filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9A of the Tax Law for the fiscal years ending October 31, 1977 through October 31, 1979 (File No. 32497).

ISSUE

FINDINGS OF FACT

1. Petitioner filed a New York Corporation Franchise Tax Report for the fiscal year November 1, 1976 through October 31, 1977. On this report, petitioner claimed an investment tax credit based upon the purchase of a well-drilling machine.

2. Petitioner filed New York State Corporation Tax Reports for the fiscal years November 1, 1977 through October 31, 1978 and November 1, 1978 through October 31, 1979. On each report petitioner claimed a carryover of the unused portion of the investment tax credit which it had claimed for the period November 1, 1976 through October 31, 1977.

3. On December 5, 1980 the Audit Division issued three Notices of Deficiency accompanied by three Statements of Audit Adjustment to petitioner. The first Notice of Deficiency was for the fiscal year ended October 31, 1977 and asserted a tax due of \$309.00 plus interest of \$75.86 for a total amount due of \$384.86. However, this Notice of Deficiency was adjusted to take into account credits from prior periods of \$139.01 resulting in a balance due of \$245.85. The Statement of Audit Adjustment which accompanied this Notice explained that the investment tax credit on the well-drilling machine was disallowed because the business activity constituted the performance of a service and not the production of marketable goods and wares.

4. The second Notice of Deficiency was for the fiscal year ended October 31, 1978 and asserted a deficiency of \$413.00 plus interest of \$71.17 for a total amount due of \$484.17. The third Notice of Deficiency was for the fiscal year ended October 31, 1979 and asserted a deficiency of \$669.00 plus interest of \$58.43 for a total amount due of \$727.43. The Statement of Audit Adjustment which accompanied each of these notices explained that the carryover of the unused investment tax credit had been disallowed based on the adjustment for the year 1977.

5. Petitioner acquired the well-drilling machine on September 19, 1977 at a cost of \$59,073.00.

6. Petitioner is in the business of drilling wells in order for its customers to have access to subterranean water. This activity entails setting up a drilling rig at the job site and drilling into the earth. Thereafter, petitioner sinks a pipe into the hole and brings the water forth. The drilling rig is mounted on a truck and moved from job site to job site.

7. Petitioner does not refine the water in any way. However, a customer may refine the water. Petitioner has both residential and commercial customers.

CONCLUSIONS OF LAW

A. That during the period in issue section 210.12(b) of the Tax Law provided:

"A credit shall be allowed under this section with respect to tangible personal property and other tangible property, including buildings and structural components of buildings, which are: depreciable pursuant to section one hundred sixty-seven of the internal revenue code, have a useful life of four years or more, are acquired by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, have a situs in this state and are principally used by the taxpayer in the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture or commercial fishing. For purposes of this paragraph, manufacturing shall mean the process of working raw materials into wares suitable for use or which gives new shapes, new quality or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment. Property used in the production of goods shall include machinery, equipment or other tangible property which is principally used in the repair and service of other machinery, equipment or other tangible property used principally in the production of goods and shall include all facilities used in the production operation, including storage of material to be used in production and of the products that are produced."

B. That although neither the Tax Law nor the Regulations provide a definition of extraction, Treasury Regulation §1.48-1(d)(2), which was in

effect during the period in issue and which discussed the property to which the Federal investment tax credit applied, stated, in pertinent part:

"Manufacturing, production, and extraction. For purposes of the credit allowed by section 38, the terms "manufacturing", "production", and "extraction" include the construction, reconstruction or making of property out of scrap, salvage, or junk material, as well as from new or raw material, by processing manipulating, refining, or changing the form of an article, or by combining or assembling two or more articles, and include the cultivation of the soil, the raising of livestock, and the mining of minerals. Thus, section 38 property would include, for example, property used as an integral part of the extracting, processing, or refining of metallic and nonmetallic minerals, including oil, gas, rock, marble, or slate..." (emphasis added).

C. That water is generally regarded as a mineral (Cf. Hathorn v. Natural Carbonic Gas Co., 194 N.Y. 326, 338; see generally, 37 N.Y. Jur., Mines and Minerals, §3; 58 C.J.S. Mines and Minerals, §2(7)).

D. That the water well-drilling equipment in issue was used in the production of water by extraction. Accordingly, petitioner was entitled to claim an investment tax credit for the well-drilling equipment.

E. That the petition of Noris J. Stone & Sons, Inc. is granted and the notices of deficiency issued December 5, 1980 are cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

FEB 29 1984

Roderick A. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER